

**IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON**

[2014] NZERA Wellington 137
5446162

BETWEEN LUKE KEIRSEY
 Applicant

AND BETTY WHITE LIMITED
 Respondent

Member of Authority: G J Wood

Representatives: Buddy Keirsesey for Applicant
 Gina Mills for Respondent

Investigation Meeting: 16 October 2014 at Wellington

Submissions Received: 16 October 2014

Determination: 22 December 2014

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The applicant, Mr Luke Keirsesey, claims that he was unjustifiably dismissed by Betty White Limited t/a Hummingbird (Betty White) because he was dismissed without warning. He seeks compensation of six months' pay together with \$6,000 for hurt, humiliation and injury to feelings.

[2] Betty White considers that Mr Keirsesey's claim should have been made against Amphibian Limited t/a The Spruce Goose, which is another company which Betty White's principals, Mrs Gina and Mr Nick Mills, own and operate. Mr Keirsesey worked for the majority of his time, after a brief period at Hummingbird, at The Spruce Goose. While they accept that if Mr Keirsesey's employment is with Betty White then his dismissal will have been unjustified, because his trial period was not effective in law, they do not accept that he is entitled, in equity and good conscience, to any remedies.

Issues

[3] The issues for determination are:

- (a) Who was Mr Keirse's employer - Betty White or Amphibian; and
- (b) If employed by Betty White, is Mr Keirse entitled to any remedies for unjustified dismissal?

Factual discussion

[4] In determining this matter I have relied on the documentation provided by the parties and where there are disputes over the facts (for reasons clear to the parties at the investigation meeting) the evidence of Ms Gina Mills and Mr Sahil Hussein, Amphibian's executive chef, over that of Mr Keirse.

[5] The Mills own and operate three restaurant/cafés in Wellington, namely Hummingbird, The Spruce Goose and Public, which are all constituted as different companies, with Purple Moon Limited operating Public. While employees generally have an employment agreement with only one of the companies, a number of them, such as Mr Hussein and Mr Keirse, have worked over several of the companies and their employment agreements specifically allow for that.

[6] Mr Keirse was originally engaged on a trial basis as a demi chef at Hummingbird (Betty White). He worked there on a trial basis on Thursday, 14 November 2013. His trial continued at Public on Friday and Saturday, 15 and 16 November. Mr Keirse was paid for this 17.5 hours three day trial. Mrs Mills stated in evidence that she and her husband did not agree with the concept of unpaid trials, which are quite common in the hospitality industry. However, as discussed below and as unknown to the Mills at the time, whether a trial is paid or unpaid, it still constitutes prior work when done as a working trial in the workplace. As has been clear law since August 2013 such work means that an employer cannot later rely on the protections of a trial period against claims of unjustified dismissal, even where there is written agreement to that effect.

[7] On Monday, 19 November Mr Keirse attended work at Hummingbird and was provided that day with an employment agreement between himself and Betty White. This remained the only employment agreement applying to Mr Keirse. Even

although The Spruce Goose (through Amphibian) paid Mr Keirse's wages for the bulk of the period he was employed by Betty White, no employment agreement with it was ever offered to Mr Keirse.

[8] The employment agreement was provided to Mr Keirse during the course of his first day at work after his trial and was signed by him then. He was to be paid \$16 per hour, a figure which did not change during the course of his employment. His role was as a demi chef de partie on a full time basis commencing on 19 November. The agreement also provided for a trial period of 90 days to determine Mr Keirse's suitability for permanent employment. Four weeks' notice of termination was required on either side, except in the case of serious misconduct. Schedule A provided his place of work to be Betty White Limited t/a Hummingbird and/or other outlets as required.

[9] Mrs Mills and Mr Hussein soon came to the conclusion that Mr Keirse did not possess the skills to be a demi chef de partie at what was described as a "*near fine dining restaurant*", i.e. Hummingbird. However, the Mills were about to open a new café known as The Spruce Goose and Mrs Mills and Mr Hussein considered that Mr Keirse could be a useful employee in that new operation, which was to be run by Mr Hussein. Mr Keirse agreed with the suggestion that he start work at The Spruce Goose under the supervision of Mr Hussein and he did so even before the café had opened.

[10] The café was very successful on opening. Mr Keirse worked long hours between 6 December 2013, when The Spruce Goose opened, and the termination of his employment on 3 January 2014. While an employment agreement with Amphibian Limited t/a The Spruce Goose was drawn up by the Mills, it was never presented to Mr Keirse, although he was paid by Amphibian from the period ending 8 December 2013 onwards.

[11] In the three full weeks that Mr Keirse worked in The Spruce Goose café after it was open, he averaged over 60 hours a week, which gives credence to Mr Keirse's unchallenged evidence that he was working twelve hour days at The Spruce Goose. In these circumstances one might expect some sympathy from an employer when, on two occasions, he slept through his alarm after working late the night before. Indeed, while Betty White was unimpressed with Mr Keirse's sleeping in, he was not subject to any specific warning over these issues.

[12] On the other hand, Mr Hussein was becoming more and more frustrated with what he saw as Mr Keirse's lack of speed at his work and his failure to carry out specific instructions for food preparation, which he put down to a lack of retentive ability on Mr Keirse's part rather than any deliberate failings. Mr Hussein and the Mills were thus becoming more and more frustrated with what in their view was Mr Keirse's lack of performance.

[13] While Mr Keirse was never given a formal warning that his job was in jeopardy, nor told of any period for improvement that one would have expected in employment law terms and under his employment agreement, he was told on one occasion that if he did not improve his performance, Mr Hussein and the Mills would have to look at his employment situation. On the other hand, I do not accept that Mr Hussein was, as is alleged, abusive or threatening towards Mr Keirse. Rather, Mr Hussein was becoming more and more frustrated with what he saw as Mr Keirse's lack of speed and inability to multi-task.

[14] Mr Keirse had also had some time off for injury while at Hummingbird because of a non-work injury. In addition, on New Year's Eve, a very busy day for The Spruce Goose, Mr Keirse rang in to state that he could not go to work because of pains in his leg and that he would get a medical certificate. On Friday 3 January 2014, when Mr Keirse came into The Spruce Goose to present his medical certificate, he asked to see Mr Hussein, who was not expecting him. Mr Keirse handed Mr Hussein his medical note and Mr Hussein's response to him was that he was no longer required to work because he could not do the job. Mr Keirse asked if he could speak to somebody else and Mr Hussein said that he could talk to Mr or Mrs Mills. He did not take up the opportunity to discuss the matter with Mr or Mrs Mills.

[15] Mr Keirse was not paid any notice. This was in breach of the four weeks' notice required under the employment agreement.

[16] Mr Keirse was not able to find another job for six months and was required to go back on the unemployment benefit in the interim. He was not successful in his job search during that period despite applying more than 20 jobs. He is now gainfully employed in the hospitality industry.

[17] After Mr Keirse raised a personal grievance the matter went to mediation. Despite mediation and attempts by the parties to resolve matters on their own terms, the matter still remains unresolved.

The law

[18] Betty White now understands that it has acted in breach of the duo of Employment Court judgments *Smith v. Stokes Valley Pharmacy (2009) Ltd* [2010] NZEmpC 111 and *Salad Bowl Ltd v. Howe-Thornley* [2013] NZEmpC 152.

[19] In essence these cases hold that trial provisions put into employment agreements pursuant to s.67A are to be interpreted strictly and address only the circumstances of “new” employees; namely people who had not previously been employed or had not been employed recently, and for whom obtaining employment might prove difficult. The definition of a new employee was found in *Smith* not to include employees who had already started work even for a matter of days before their employment agreement were executed. Furthermore, in *Salad Bowl* it was found that any trial periods, whether paid or unpaid, constitute prior employment.

Determination

[20] Employees cannot be transferred from one employer to another without their agreement. In this case, while the Mills had prepared an employment agreement for Mr Keirse with Amphibian Limited, trading as The Spruce Goose, rather than Betty White Limited trading as Hummingbird, this transfer never occurred as it was never even presented to Mr Keirse for consideration. Mr Keirse therefore remained on his employment agreement with Betty White, which provided for his place of work to be at Hummingbird and/or other outlets as required.

[21] While this point was not made by Betty White, I note that in Schedule A (the summary of the terms and conditions of employment), Amphibian Limited t/a The Spruce Goose was named as the employer. However I hold that this is overridden by the fact that the place of work was described in the same agreement as Betty White Limited t/a Hummingbird, that the individual employment agreement is stated to be between Betty White Limited t/a Hummingbird and Luke Keirse and Mr Keirse was initially employed to work at Hummingbird.

[22] Mr Keirsej was not a new employee when he signed the trial period agreement with Betty White. Thus the trial period that Betty White Limited sought to rely on was ineffective, particularly due to his trial period constituting work. Applying the law to the facts, it is clear that Mr Keirsej was employed throughout by Betty White and that his dismissal was unjustified, because Betty White relied on a trial period that was ineffective. For reasons given above the dismissal did not meet any of the statutory tests in section 103A relating to what was in essence a performance dismissal. Even under the trial period clause Betty White had been obliged to advise him *specifying the area of dissatisfaction, the improvement required and the period of time by which that improvement is to be achieved*. Mr Hussein's actions never at any point met these specific requirements.

[23] I accept Mr Hussein's evidence that Mr Keirsej's employment was terminated because he had simply had enough of Mr Keirsej's performance, principally because of what Mr Hussein and the Mills considered his slowness and inability to multi-task, which are no doubt important qualities in a chef-related position.

[24] Instead, Betty White was required to go through proper disciplinary procedures with Mr Keirsej, which would have included warnings, the giving of timeframes, support and a real opportunity to improve. In reality, by contrast, Mr Keirsej was dismissed without notice, without investigation, and without raising any of its concerns with Mr Keirsej formally, as required under the employment agreement and under s.103A.

[25] Even under the employment agreement Mr Keirsej was entitled to four weeks' notice, which he was not paid, constituting another reason for his employment being terminated unjustifiably.

[26] As a result of the unjustifiable dismissal, the Authority must order Betty White to pay Mr Keirsej the lesser of a sum equal to his lost remuneration or three months' ordinary time remuneration. In this case, Mr Keirsej has lost in excess of three months' remuneration. Thirteen weeks' remuneration constitutes \$8,320 at the rate claimed of \$640 per week.

[27] I am satisfied that Mr Keirsej has mitigated his loss and therefore, subject to contribution, he is entitled to be paid at least that sum. On the other hand I am not prepared to extend to an employee who worked for an employer for less than seven

weeks a sum greater than three months' lost remuneration. Indeed it is unlikely that an employee such as Mr Keirse, subject to genuine concerns over his performance, would have remained employed by Betty White for longer than the three months.

[28] Mr Keirse gave no evidence whatsoever about how he was affected by the dismissal, other than to state that he felt he was unfairly dismissed and started working towards mediation. In these circumstances, an award of no greater than \$1,500 can be justified, given that I accept that Mr Keirse was upset at having been dismissed unfairly, as was evident from his demeanour at the investigation meeting.

[29] The Authority must also determine contribution, i.e. the extent to which the actions of Mr Keirse contributed towards the situation that gave rise to the personal grievance and if those actions so require, reduce the remedies that would otherwise have been awarded.

[30] In this case, Mr Keirse was not responsible for the employer's improper implementation and use of a trial period, nor the failure to implement any form of proper investigation and disciplinary processes required under the employment agreement.

[31] On the other hand, it was clear that Mr Keirse's performance at work was not acceptable to Betty White. It was Mr Keirse's substandard performance by the employer's assessment that led to his termination, due to frustration on Betty White's part and a belief that Mr Keirse would never meet its standards. Although Betty White did provide training and support to Mr Keirse, it did not go through any proper disciplinary procedures and did not formally warn him that his employment was at risk. Similarly, the fact that Mr Keirse has subsequently held down a full time job for a number of months in the hospitality industry demonstrates that he does have the ability to meet the standards of a busy kitchen.

[32] Mr Keirse's behaviour must be blameworthy for there to be any reduction. There can be no blame attached to him having a painful leg causing him to be unfit to work. On balance, I also accept that his failure to meet his employer's standards was not blameworthy behaviour contributing to his unjustified dismissal because he was doing his best at work, was not subject to the performance improvement process under the employment agreement and has been able subsequently to hold down a job in the industry. This was not a case of a worker who deliberately disobeyed any

instructions or was slack or lackadaisical at work. Therefore any blame for the situation that gave rise to this personal grievance must lie with Betty White for failing to adhere to its own unlawful trial period, failing to keep abreast of the requirements of the law and failing to treat Mr Keirseay fairly accordingly.

[33] I therefore order the respondent, Betty White Limited, to pay to the applicant, Mr Luke Keirseay, the following sums:

- (a) \$8,320 gross in lost remuneration; and
- (b) \$1,500 net in compensation under s.123(1)(c)(i) of the Employment Relations Act 2000.

Costs

[34] Costs are reserved.

G J Wood
Member of the Employment Relations Authority